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GLANCING AT THE CONTENT OF SUBSTANTIVE RULES UNDER THE JURISDICTION-SELECTING APPROACH

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In his celebrated article of 1933,¹ Professor Cavers first propounded the "rule-selective" approach to choice of law in contrast to the traditional approach which he then labeled "jurisdiction-selecting" and later,² for the sake of clearness and broader acceptability, "state-selecting." He pointed out that some trace of the "rule-selective" approach is found also within the domain of the traditional approach. This observation may have been meant to soothe apprehensions on the part of "conservatives" by showing that what was proposed was not unheard of but rather the blossoming into full flower of old and random insights. The remark shows the balanced and scholarly temper of the author who did not want, as most innovators understandably do, to emphasize the originality and importance of the proposal. He was, however, fully aware that, with his "academic" idea, he was urging "at least the reconsideration, perhaps the abandonment, of all the current rules."³

The main thrust of Cavers' "critique of the choice-of-law problem" is common knowledge among students of private international law the world over. It is that, in considering a multistate case—one connected with more than one legal system—the decision-maker should not effect choice by a process of finding the legal system qualified to supply the rule of decision because of a significant connection with the case. Rather he should choose directly between the specific substantive rules of the legal systems variously

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1. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 182-87 (1933) [hereinafter Cavers]; reprinted in *SELECTED READINGS ON CONFLICT OF LAWS* 101, 107-10 (M. Culp ed. 1956), and *INTERNATIONALES PRIVATRECHT* 126, 136-42 (P. Picone & W. Wengler eds. 1974) (Addendum 1972 at 166 also published in 17 HARV. INT'L L.J. 65 (1976)).

2. Cavers, *Contemporary Conflicts Law in American Perspective*, HAGUE ACADEMY OF INTERNATIONAL LAW, 131 RECUEIL DES COURS 85, 103 (1970 III) [hereinafter RECUEIL DES COURS].

3. Cavers, *supra* note 1, at 204.

connected with the case by an evaluation of the rules with a view to finding the solution which best fits the situation, in light of the circumstances, of the comparative merits of the substantive rules available, and of the connecting factors leading to these rules.

Certain incisive expressions used by Cavers to spread his message have become part of the universal language of private international law. I think particularly of his reference to the traditional conflicts rules as "jurisdiction-selecting rules" operating a "blindfold test"⁴ because they choose between legal systems ("jurisdictions") without looking into them, as if the reference were to closed boxes, only the chosen to be opened and scrutinized for its contents after the choice had been made on the basis of external factors.

I have always felt⁵ that Cavers' method is cut to measure for judge-made law and that it is not suitable for legislative techniques. Typically, a court decision deals with the individual case whose elements and features are presented to the court or can be elicited by it as needed for understanding and deciding. In the conflicts case, especially where it is up to the parties to present it as one by raising the question of the applicability of a foreign provision, the court has at least an inkling of what the result will be when one rather than the other of the available laws is applied. The choice between them may well be influenced (and at first Cavers seemed to intimate that it should be so influenced, nay determined) by the foreknowledge of these different results.⁶

In my opinion, under Cavers' original approach to conflict of laws, choice-of-law "rules," *i.e.* conceptual formulations of precepts endowed with a considerable degree of generality and abstraction, are hardly possible. Legislation, be it internal (statutes, codes) or international (treaties, conventions), usually consists of rules. Under Cavers' distinctive approach, one can only have "pre-

4. Significantly, Professor Deelen, of the University of Tilburg, gave a sketch of modern views about private international law the title "Savigny's Blindfold." J.E.J. TH. DEELEN, *DE BLINDDOEK VAN VON SAVIGNY* (1967). The jurisdiction-selecting approach indeed goes back to the conception of private international law held by that leading European jurist of the early nineteenth century who advocated a set of rules of universal validity fixing (from above, one might say) the sphere of application of the different legal systems on the basis of connecting factors thought proper for the different types of legal relationships. The most recent contribution to the discussion of basic reform proposals concerning conflict of laws, EGON LORENZ, *ZUR STRUKTUR DES INTERNATIONALEN PRIVATRECHTS* (1977), starts, as a matter of course, with a critical analysis of the view of Savigny.

5. See R. DE NOVA, *LE CONCEZIONI STATUNITENSI DEI CONFLITTI DI LEGGI VISTE DA UN CONTINENTALE* 32 (1964), reprinted in R. DE NOVA, *SCRITTI DI DIRITTO INTERNAZIONALE PRIVATO* [hereinafter *SCRITTI*] 631, 654-55 (1977); De Nova, *Historical and Comparative Introduction to Conflict of Laws*, 118 *RECUEIL DES COURS* 441, 599, 603 (1966 II).

6. In the words of Cavers, "the court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect the controversy?" Cavers, *supra* note 1, at 189. "Perspicacity," he says (at 192), is peculiarly essential for dealing with complex issues such as those raised by interstate or international cases, and yet courts blind themselves to the content of the law to which the rule or principle of selection points and to the result which that law may work in the case before them, under the mistaken assumption that here their task is to "seek an appropriate jurisdiction, not an appropriate substantive rule." *Id.* at 178.

cedents,"⁷ and quite narrow ones at that.⁸ This means that, practically at least,⁹ only courts can follow his advice.

An indirect proof of this feature of Cavers' system is that the "avenues of escape" from the traditional "entanglement," which he finds to have been tried from time to time by the courts and suggested by some American authors, also appear to have been attempted in identical or similar terms in legal orders where the choice of law is basically statutory. However, these attempts relate either to special situations and take a very special form, or they relate to a problem of conflict of laws that cannot properly be solved by legislation.

Cavers mentions, first of all, conflicts rules "couched in terms of a result regarded as proper in litigation of a given sort."¹⁰ By way of illustration he mentions the choice of usury laws: under a trend apparent in American conflicts doctrine and practice, contracts to which the objection of usury was made were carried out if they were valid under "the law of any jurisdiction to which the transaction was materially related." The learned author also recalls¹¹ the suggestion made by Professor Lorenzen that this solution in favor of the *lex validitatis* (to use Professor Ehrenzweig's terminology) be extended whenever the "intrinsic validity" of a contract is under scrutiny.

A similar solution is accepted for formalities in most legal systems. For instance, under art. 26(1) of the Preliminary Dispositions to the Italian Civil Code, "The form of *inter vivos* acts and of acts of last will is governed by the law of the place in which the act is completed or by the law which governs the substance of the act, or by the national law of the transferor or by the national law of the contracting parties, if it is common." Under the generally accepted construction, this means that, in Italian private international law, the

7. Cavers is perfectly right, in my opinion, when he maintains that "[n]othing in the proposed approach is inconsistent with continuance of the doctrine of *stare decisis*, properly conceived." He also realized from the start, with utter clarity, that "the creation and fruitful employment of rules of this sort must be attended by the development of standards for the evaluation of the facts which they render significant." *Id.* at 196-97. Later on, he did try his hand at formulating some such "rules of preference." D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 133-203 (1965). See also *Conflict of Laws Round Table: The Value of Principled Preferences*, 49 *TEX. L. REV.* 211 (1971), with interventions of Cavers, Sedler, Rosenberg, Ehrenzweig, and Roger Traynor.

8. "We were very fact-minded in the 30's," Cavers delightfully concedes (D. CAVERS, *THE CHOICE-OF-LAW PROCESS*, *supra* note 7, at 133-34), "and liked even our principles narrow."

9. By a flight of fancy, one can imagine a law-maker so shrewd and "herculean" as to be capable—and willing—of setting out in detail written provisions covering the whole conceivable gamut of combinations of conflictual situations and substantive rules mixtures, each hypothesis accompanied by the final choice. Yet this rulemaking process would have to be continuously resumed because mutations of the substantive rules are always impending and their character and import can hardly be foreseen with any precision. A skeptical appraisal of the "potentialities of legislation in choice of law" is expressed in Cavers, *Legislative Choice of Law: Some European Examples*, 44 *S. CAL. L. REV.* 340 (1971). With a deceptive mildness of tone, Cavers concludes that "the persistent reluctance of American conflicts scholars to advocate legislative solutions, at least for interstate conflicts, draws some support from the state of the art abroad." *Id.* at 359-60.

10. Cavers, *supra* note 1, at 182.

11. *Id.* at 182-83.

question of the formal validity of a contract is not settled merely by a reference to a legal system chosen on account of a certain connecting factor (e.g., that of the place of execution); rather, a plurality of references is envisaged. Reference is precisely to the *lex loci contractus celebrati*, the *lex patriae communis* of the contracting parties, and the law governing the contract in general. Among these legal systems a further, final choice is to be made by comparing their requirements for the formal validity of a contract of that type under the principle of preference *ut res magis valeat quam pereat*.¹² Here the choice-of-law process is split into two stages: in the first one, the relevant legal systems are indicated (*lex loci contractus celebrati*, *lex patriae communis*, *lex contractus*) without any regard to what their respective substantive rules require for the formal validity of the contract; in the second and conclusive one, these substantive rules are considered and compared, to see whether the contract was executed properly at least from the viewpoint of one of them.

A similar choice within a choice—one being “jurisdiction-selective” in character, the other “rule and result-selective”—is contemplated whenever two or more connecting factors are considered at the same time and the final decision is made to depend upon the comparative merits (in relation to a certain substantive “value”) of the substantive rules of the legal systems identified by the connecting factors. Thus, when the “interests” of a minor or an adoptee are taken to be paramount, the personal law of the parent or the adopter, or, on the contrary, that of the minor or the adoptee, shall prevail in determining the legal effects of minority or adoption, according to whether the provisions of the former or of the latter law are more favorable to the child.¹³

12. On the international level, see the Hague Convention of Oct. 5, 1961 relating to the Form of Testamentary Dispositions, 9 AM J. COMP. L. 705 (1960), art. 1: “A testamentary disposition shall be valid as regards form if its form complies with the internal law (a) of the place where the testator made it, or (b) of a nationality possessed by the testator, either at the time when he made the disposition or at the time of his death, or (c) of the place in which the testator had his domicile either at the time when he made the disposition or at the time of his death, or (d) of the place in which the testator had his habitual residence either at the time when he made the disposition or at the time of his death, or (e) so far as immovables are concerned, of the place where they are situated.” See Casswell, *The Conflict of Laws Rules Governing the Formal Validity of Wills: Past Developments and Suggested Reform*, 15 OSGOODE HALL L.J. 165, 173-202 (1977). See also Van Hecke, *Principes et méthodes de solution des conflits de lois*, 126 RECUEIL DES COURS 409, 478-79 (1969 I), where still other instances are briefly considered. The author concludes that “le souci du contenu de la règle déclarée applicable n’est donc pas entièrement étranger au droit international privé tel qu’il se pratique aujourd’hui. Mais ce souci se manifeste sous la forme d’un rattachement alternatif et ainsi la sécurité juridique que procure la règle de rattachement est-elle sauvegardée.”

13. Professor Ferrer Correia, *Les problèmes de codification en droit international privé*, 145 RECUEIL DES COURS 67, 118, n.24 (1975 II), is critical of any further expansion of such “loaded” decisions. But, in my opinion, social considerations may favor it easily, for instance in the field of labor law, to protect the employee who is supposed to be the weaker party or the more deserving one. See Däubler, *Grundprobleme des internationalen Arbeitsrechts*, 18 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 1, 8-12 (1972), and, more moderately, by resorting to the shield of “ordre public,” Pocar, *La legge applicabile ai rapporti di lavoro secondo il diritto italiano*, 8 RIVISTA DI DIRITTO

Cavers' technique also is "two-phased," because necessarily, one starts by establishing which legal systems are to be looked into in the search for the substantive rule appropriate to the case.¹⁴ Cavers does not propose or expect, for instance, that an American court consult the national law (*lex patriae*) of a party,¹⁵ even in matters of capacity or family relations;¹⁶ such a connecting factor as nationality is immaterial from the point of view of American positive law and legal tradition in the field of "horizontal" conflict of laws.¹⁷ This means that certain contacts are relevant, and others are not; such relevance or irrelevance depending also, I would suppose, on the subject matter.

After criticizing the traditional conception of the function of connecting factors by the felicitous simile of the "coin, which, when inserted in the doctrinal slot machine, produces the appropriate jurisdiction," provided the coin fits the slot,¹⁸ Cavers indeed opposes to it¹⁹ that, "if a law is to be chosen with

INTERNAZIONALE PRIVATO E PROCESSUALE 727, 744-50 (1972). According to Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM. J. TRANSNAT'L L. 1, 17 (1977), "[F]avoritism to the plaintiff may well be a characteristic of future choice-of-law."

The "new Cavers" (Addendum 1972, *supra* note 1, at 172) seems to advocate the development ("by a rational judge or legislature") of a set of preferences that would lead, subject matter by subject matter, to "the more protective law." It appears to me that such a step requires a decision about which is the "interest" worthier of protection: in the words of Cavers, "Under what circumstances is it fair to the parties that one be advantaged and the other disadvantaged?"

14. This is a point that von Mehren & Trautman properly stress by pointing out that first of all the choice-of-law process requires the determination of the relevant connecting factors, leading to the "concerned jurisdictions" and their relevant and possibly conflicting rules of law from which, either through a choice or a combination, the court is going to draw the terms for the decision of the case. A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 76, 102-105 (1965).

Even when it is not stated which are the connections to be taken into account, but one speaks generally of "substantial connections" (see the suggestion by Lorenzen concerning contracts noted by Cavers, *supra* note 11), not all conceivable connections are meant: in the broadest sense, the reference will be to those connecting factors that are at least the subject of debate in "literary circles," and, in a narrower, more plausible sense, to those factors that are used by the body of conflicts rules of the forum.

15. A supporter of the conception of private international law rules as "unilateral" such as Sohn, *New Bases for Solution of Conflict of Laws Problems*, 55 HARV. L. REV. 978 (1942), would do so whenever the forum is not interested and a foreign legal system puts forward its own rules for application on the basis of such a connection. *Id.* at 995-96. In Italy, the theory was advocated by my lamented colleague ROLANDO QUADRI, *LEZIONI DI DIRITTO INTERNAZIONALE PRIVATO*, (3d ed. 1961) (see De Nova, *New Trends in Italian Private International Law*, 28 LAW & CONTEMP. PROB. 808, 817-21 (1963), reprinted in DE NOVA, SCRITTI, *supra* note 5, at 53-59), and was and is championed along similar lines by Professor GIUSEPPE SPERDUTI, *SAGGI DI TEORIA GENERALE DI DIRITTO INTERNAZIONALE PRIVATO* (1967); see also Sperduti, *Théorie du droit international privé*, 122 RECUEIL DES COURS 173 (1967 III).

16. Where the *lex domicilii* of one party, or both, and the *lex loci actus* (or the *lex contractus*) are the only terms of comparison accepted. See Cavers, *supra* note 1, at 180, 190.

17. To use the terminology of von Mehren & Trautman, *supra* note 14, at 995-96. In the United States, the "vertical" conflicts of laws, i.e., those between Federal and State powers and organs, do call into play the criterion of citizenship, particularly, for establishing the so-called "diversity jurisdiction."

18. Cavers, *supra* note 1, at 191-92.

19. *Id.* at 192.

some consideration of the result it effects in a given litigation, then the contact should itself be significant in relation to that result." I take this to mean that the contact's final significance depends on the content of the provisions of the legal system to which it leads: if these provisions are appropriate, they apply (and the contact, therefore, is effective); if they are not appropriate, the contact will be discarded and another one leading to appropriate rules will prevail. In any case, the idea of a conflict of laws implies that at least one foreign legal system, besides the *lex fori*, comes into consideration at the start and a foreign legal system comes into view for conflict-of-laws purposes through a connecting factor.

As an instance of peeping from under the blindfold, Cavers also mentioned the fact that, usually, the "intention of the parties" plays a role in determining the law applicable to contracts;²⁰ he argues that "the parties themselves will probably have appraised the consequences of an application of the law intended to the controversy in question." Years ago I pointed out, however, that the way the "autonomy of the parties" works is uncertain precisely on a point of importance in the present context.²¹ If the reference by the contracting parties to a given law amounts to a definite, open-eyed choice of the solution envisioned by that law for the situation contemplated, which apparently is Cavers' interpretation, then its provisions ought to be applied as they stood *at the time of the choice*; yet it is usually accepted²² that, even in the case of a choice by the parties, the applicable rules are those effective *at the time for application* (practically, the time of suit).

According to Cavers,²³ another instance of an examination of "the competing rules of law as a means of determining the appropriate law to be applied" is the discarding of a foreign rule of law when it is found to be procedural in character. I am not so sure. Under the jurisdiction-selecting approach, and by *lege fori* characterization, what counts is the procedural character of a rule of the forum law, not that of the foreign law. Should a matter be attached to procedure within the conceptual framework of the *lex fori*, the provision of the latter shall apply to it, any foreign provision being immaterial; on the contrary, should a matter be substantive under the *lex fori*, the provision applicable to it under the legal system selected by the choice-of-law rules of the forum shall apply, even if the matter is "procedural in character" from the point of view of its own legal system.

20. *Id.* at 184-85.

21. See De Nova, *Soluzione del conflitto di leggi e regolamento confacente del rapporto internazionale*, in *STUDIA GHISLERIANA: STUDI GIURIDICI IN MEMORIA DI P. CIAPESSONI* 117, 139, n.55 (1947), reprinted in DE NOVA, *SCRITTI*, *supra* note 5, at 3, 23, n.55 (1977); De Nova, *Solution du conflit de lois et règlement satisfaisant du rapport international*, 37 *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 179, 192, n.3 (1948).

22. Curti Gialdino, *La volontà des parties en droit international privé*, 137 *RECUEIL DES COURS* 743, 911-12 (1972 III).

23. Cavers, *supra* note 1, at 185-86.

A type of situation where the solution of a conflict of laws is presented as being dependent on the content of substantive rules of the legal systems concerned is offered, strangely enough, by a staunch supporter of the traditional technique, Professor Morelli. In his renowned outline of Italian conflict of laws,²⁴ the learned author maintains that the establishment of an adoption depends, according to the Italian choice-of-law rules,²⁵ on the *leges patriae* of adopter and adoptee: "One must leave out of consideration, however," he adds, "those requirements that the *lex patriae* of the adoptee has laid down only in order to protect the adopter's family and, on the other hand, those requirements that under the *lex patriae* of the adopter aim at protecting the freedom of the adoptee or of his family to prevent the adoption." This seems to mean that the scope of application of the *lex patriae* of the adoptee and the *lex patriae* of the adopter, respectively, is not completely determined beforehand, so to speak, by the forum stating that they both apply to the requirements for adoption; but in part at least, is made dependent upon the sort of requirements that those laws contemplate and on the purpose or policy of the provisions. But perhaps this conclusion is based on a misconception caused by the elliptical form of presentation of Morelli's opinion. What he has in mind, probably, is a choice-of-law rule of this sort: the national law of the adoptee "governs" the requirements for adoption that, in light of the forum's legal conceptions, impinge on the interests of the adoptee or of his family, while the national law of the adopter "governs" the requirements for adoption touching upon the interests of the adopter or of his family. Under this formula, it is clear from the start (and, of course, one starts at the forum) not only which are the applicable laws, but also to what sort of questions they respectively apply.²⁶

A situation in which, under the jurisdiction-selective approach, "a frank discarding of the blindfold" takes place is, according to Cavers,²⁷ the discarding of the conflict-of-laws rule "when the foreign law it selects dictates a result repugnant to the public policy of the forum." He is perfectly right, but the situation is peculiar. Here even in a legal order endowed with a system of statutory rules on choice of law, the problem is not and cannot be properly

24. GAETANO MORELLI, *ELEMENTI DI DIRITTO INTERNAZIONALE PRIVATO ITALIANO* 131 (10th ed. 1971).

25. Art. 17(1) of the Preliminary Dispositions of the Civil Code (1942) provides: "The status and capacity of persons and family relations are governed by the law of the state to which the persons belong." See McCusker, *The Italian Rules of Conflict of Laws*, 25 TUL. L. REV. 70, 77 (1950). In Morelli's opinion, art. 20(2), which deals expressly with adoption and submits it (more precisely, the "relationships between adopting parent and adopted child") to the national law of the adopter at the time of adoption, covers only the *effects* of adoption, so that for the conflicts rule on its coming into being one must look elsewhere, and precisely at art. 17(1).

26. I may add that, under the interpretation given by Morelli, the requirements of both *leges patriae* must be satisfied for the creation of an adoption when interests of both sides of the relationship or community interests are concerned.

27. Cavers, *supra* note 1, at 185.

resolved by legislation. At this point in the choice-of-law process, everywhere judicial discretion is basic, if not necessarily all-embracing.²⁸

Correctly, Cavers stresses the negative character of the public policy "exception"²⁹—or "limitation" (these being the terms used in Continental literature to distinguish the intervention of "ordre public international" from that of choice-of-law rules). It implies, the learned author remarks,³⁰ "no disavowal of the choice-of-law rule, which is preserved for use when the results it produces do not run counter to local standards of justice and policy," but unfortunately it "dispenses with the necessity for close analysis, for an affirmative appraisal of the situation upon which judgment must be passed."³¹

Thirty years ago, commenting upon Cavers' essay, I remarked³² that—apart from the serious doubts one may entertain whether, in view of its very special task of checking the end product of the choice-of-law rules, public policy is a rule of choice of law—nothing can be inferred from the public policy principle as to the way conflicts rules ought to be fashioned and ought to function, or, better, as to the way a conflict of laws ought to be resolved. One may add that, in the jurisdiction-selecting perspective, "ordre public international" comes into play when the applicable law as well as the applicable rule of the applicable law has been found and the question arises whether the rule deserves to be applied *in foro*. When this last problem is faced (and it is faced by the court), the blindfold will have already fallen. The substantive rule is in full view.

Public policy considerations, on the other hand, may come into play even before the choice-of-law process has begun³³ and thus, in a jurisdiction-selecting system, before any blindfolding because the *lex fori* has mandatory

28. Here, too, court decisions can in fact harden into precedents or some sort of "jurisprudence constante" (See JACQUES MAURY, L'ÉVICTION DE LA LOI NORMALEMENT COMPÉTENTE: L'ORDRE PUBLIC ET LA FRAUDE À LA LOI 119-120 (1952)), but with results less sure and less stable than usual; results, that is, which can be overturned, more easily than is generally the case, as a reflex of a shift in State interests or social mores.

29. Cavers, *supra* note 1, at 186, n.30: "the doctrine of public policy . . . is negative in its operation."

30. *Id.* at 183. It may be pointed out that even under the "rule-selecting approach" the disavowal of a connecting factor when it leads to an inappropriate solution of the point in issue does not prevent its effectiveness when, on the contrary, it leads to a satisfactory decision.

31. *Id.* at 184.

32. De Nova, *supra* note 21, at 139.

33. Cavers, *supra* note 1, at 183, n.20, did not miss that "resort is often had to the public policy doctrine without a determination of the choice-of-law problem at issue."

On the connection between public policy considerations and the public policy exception, on the one hand, and the so-called "rules of necessary application," on the other, see the latest statement by Sperduti, *Les lois d'application nécessaire en tant que lois d'ordre public*, 66 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 257 (1977). For the possible utilization of the latter category of rules within the framework of modern American conflicts theories see Sedler, *Functionally Restrictive Substantive Rules in American Conflicts Law*, 50 S. CAL. L. REV. 27 (1976). Cavers paid attention to this sort of rules also: see Cavers, *supra* note 7, at 225-32, and Cavers, *Contemporary Conflicts Law*, *supra* note 2, at 133-35.

provisions of such a character that they require, or seem to require, application even when, according to the forum's choice-of-law rules, the case comes under the sway of a foreign legal system. Often the doubtful point, the subject of debate, is whether, notwithstanding its foreign contacts, the case really is first of all covered by that "peremptory rule"³⁴ according to its terms and the policy it demonstrably pursues.

34. To use the striking term chosen by Professor Hilding Eek for the title of his Hague Lectures on the subject. Eek, *Peremptory Norms and Private International Law*, 139 *RECUEIL DES COURS* 1 (1973 II).